

AMENDED IN SENATE AUGUST 20, 2012

AMENDED IN SENATE JULY 3, 2012

AMENDED IN ASSEMBLY APRIL 9, 2012

AMENDED IN ASSEMBLY MARCH 27, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 2674

Introduced by Assembly Member Swanson

March 5, 2012

An act to amend ~~Section~~ *Sections 226 and 1198.5* of the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 2674, as amended, Swanson. Employment records: right to inspect.

~~Under~~

(1) Existing law requires that every employer, semimonthly or at the time of each payment of wages, furnish to each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing specified items. Existing law requires an employer to keep a copy of the statement and the record of deductions on file for at least 3 years at the place of employment or at a central location within the State of California.

This bill would provide that the term "copy," for purposes of these provisions, includes a duplicate of the itemized statement provided to an employee or a computer-generated record that accurately shows all

of the information that existing law requires to be included in the itemized statement.

(2) Under existing law, an employee has the right to inspect the personnel records that his or her employer maintains relating to the employee's performance or to any grievance concerning the employee.

This bill would require an employer to maintain personnel records for a specified period of time and to provide a current or former employee, or his or her representative, an opportunity to inspect and receive a copy of those records within a specified period of time, except during the pendency of a lawsuit filed by the employee or former employer relating to a personnel matter. The bill would provide that an employer is not required to comply with more than 50 requests for a copy of the above-described records filed by a representative or representatives of employees in one calendar month. The bill would provide that the above provisions shall not apply with respect to an employee covered by a valid collective bargaining agreement if the agreement provides, among other things, for a procedure for inspection and copying of personnel records. In the event an employer violates these provisions, the bill would permit a current or former employee or the Labor Commissioner to recover a penalty of \$750 from the employer, and would further permit a current or former employee to obtain injunctive relief and attorney's fees.

Under existing law, an employer who fails to permit an employee to inspect the employee's personnel records is guilty of a misdemeanor punishable by a fine or imprisonment, as specified.

This bill would, instead, provide that a violation of the above provisions requiring that personnel records be made available for inspection constitutes an infraction. Although this bill would change a violation of the above provisions requiring that personnel records be made available for inspection from a misdemeanor to an infraction, by expanding the scope of what would constitute an infraction, this bill would impose a state-mandated local program.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.

State-mandated local program: yes.

The people of the State of California do enact as follows:

1 *SECTION 1. Section 226 of the Labor Code is amended to*
2 *read:*

3 226. (a) Every employer shall, semimonthly or at the time of
4 each payment of wages, furnish each of his or her employees,
5 either as a detachable part of the check, draft, or voucher paying
6 the employee's wages, or separately when wages are paid by
7 personal check or cash, an accurate itemized statement in writing
8 showing (1) gross wages earned, (2) total hours worked by the
9 employee, except for any employee whose compensation is solely
10 based on a salary and who is exempt from payment of overtime
11 under subdivision (a) of Section 515 or any applicable order of
12 the Industrial Welfare Commission, (3) the number of piece-rate
13 units earned and any applicable piece rate if the employee is paid
14 on a piece-rate basis, (4) all deductions, provided that all deductions
15 made on written orders of the employee may be aggregated and
16 shown as one item, (5) net wages earned, (6) the inclusive dates
17 of the period for which the employee is paid, (7) the name of the
18 employee and the last four digits of his or her social security
19 number or an employee identification number other than a social
20 security number, (8) the name and address of the legal entity that
21 is the employer and, if the employer is a farm labor contractor, as
22 defined in subdivision (b) of Section 1682, the name and address
23 of the legal entity that secured the services of the employer, and
24 (9) all applicable hourly rates in effect during the pay period and
25 the corresponding number of hours worked at each hourly rate by
26 the employee. The deductions made from payment of wages shall
27 be recorded in ink or other indelible form, properly dated, showing
28 the month, day, and year, and a copy of the statement and the
29 record of the deductions shall be kept on file by the employer for
30 at least three years at the place of employment or at a central
31 location within the State of California. *For purposes of this*
32 *subdivision, "copy" includes a duplicate of the itemized statement*
33 *provided to an employee or a computer-generated record that*
34 *accurately shows all of the information required by this*
35 *subdivision.*

36 (b) An employer that is required by this code or any regulation
37 adopted pursuant to this code to keep the information required by
38 subdivision (a) shall afford current and former employees the right

1 to inspect or copy records pertaining to their employment, upon
2 reasonable request to the employer. The employer may take
3 reasonable steps to ensure the identity of a current or former
4 employee. If the employer provides copies of the records, the actual
5 cost of reproduction may be charged to the current or former
6 employee.

7 (c) An employer who receives a written or oral request to inspect
8 or copy records pursuant to subdivision (b) pertaining to a current
9 or former employee shall comply with the request as soon as
10 practicable, but no later than 21 calendar days from the date of the
11 request. A violation of this subdivision is an infraction.
12 Impossibility of performance, not caused by or a result of a
13 violation of law, shall be an affirmative defense for an employer
14 in any action alleging a violation of this subdivision. An employer
15 may designate the person to whom a request under this subdivision
16 will be made.

17 (d) This section does not apply to any employer of any person
18 employed by the owner or occupant of a residential dwelling whose
19 duties are incidental to the ownership, maintenance, or use of the
20 dwelling, including the care and supervision of children, or whose
21 duties are personal and not in the course of the trade, business,
22 profession, or occupation of the owner or occupant.

23 (e) An employee suffering injury as a result of a knowing and
24 intentional failure by an employer to comply with subdivision (a)
25 is entitled to recover the greater of all actual damages or fifty
26 dollars (\$50) for the initial pay period in which a violation occurs
27 and one hundred dollars (\$100) per employee for each violation
28 in a subsequent pay period, not exceeding an aggregate penalty of
29 four thousand dollars (\$4,000), and is entitled to an award of costs
30 and reasonable attorney's fees.

31 (f) A failure by an employer to permit a current or former
32 employee to inspect or copy records within the time set forth in
33 subdivision (c) entitles the current or former employee or the Labor
34 Commissioner to recover a seven-hundred-fifty-dollar (\$750)
35 penalty from the employer.

36 (g) The listing by an employer of the name and address of the
37 legal entity that secured the services of the employer in the itemized
38 statement required by subdivision (a) shall not create any liability
39 on the part of that legal entity.

1 (h) An employee may also bring an action for injunctive relief
2 to ensure compliance with this section, and is entitled to an award
3 of costs and reasonable attorney's fees.

4 (i) This section does not apply to the state, to any city, county,
5 city and county, district, or to any other governmental entity, except
6 that if the state or a city, county, city and county, district, or other
7 governmental entity furnishes its employees with a check, draft,
8 or voucher paying the employee's wages, the state or a city, county,
9 city and county, district, or other governmental entity shall use no
10 more than the last four digits of the employee's social security
11 number or shall use an employee identification number other than
12 the social security number on the itemized statement provided with
13 the check, draft, or voucher.

14 **SECTION 1.**

15 *SEC. 2.* Section 1198.5 of the Labor Code is amended to read:

16 1198.5. (a) Every current and former employee, or his or her
17 representative, has the right to inspect and receive a copy of the
18 personnel records that the employer maintains relating to the
19 employee's performance or to any grievance concerning the
20 employee.

21 (b) (1) The employer shall make the contents of those personnel
22 records available for inspection to the current or former employee,
23 or his or her representative, at reasonable intervals and at
24 reasonable times, but not later than 30 calendar days from the date
25 the employer receives a written request, unless the current or former
26 employee, or his or her representative, and the employer agree in
27 writing to a date beyond 30 calendar days to inspect the records,
28 and the agreed-upon date does not exceed 35 calendar days from
29 the employer's receipt of the written request. Upon a written
30 request from a current or former employee, or his or her
31 representative, the employer shall also provide a copy of the
32 personnel records, at a charge not to exceed the actual cost of
33 reproduction, not later than 30 calendar days from the date the
34 employer receives the request, unless the current or former
35 employee, or his or her representative, and the employer agree in
36 writing to a date beyond 30 calendar days to produce a copy of
37 the records, as long as the agreed-upon date does not exceed 35
38 calendar days from the employer's receipt of the written request.
39 Except as provided in paragraph (2) of subdivision (c), the
40 employer is not required to make those personnel records or a copy

1 thereof available at a time when the employee is actually required
2 to render service to the employer, if the requester is the employee.

3 (2) (A) For purposes of this section, a request to inspect or
4 receive a copy of personnel records shall be made in either of the
5 following ways:

6 (i) Written and submitted by the current or former employee or
7 his or her representative.

8 (ii) Written and submitted by the current or former employee
9 or his or her representative by completing an employer-provided
10 form.

11 (B) An employer-provided form shall be made available to the
12 employee or his or her representative upon verbal request to the
13 employee's supervisor or, if known to the employee or his or her
14 representative at the time of the request, to the individual the
15 employer designates under this section to receive a verbal request
16 for the form.

17 (c) The employer shall do all of the following:

18 (1) With regard to all employees, maintain a copy of each
19 employee's personnel records for a period of not less than three
20 years after termination of employment.

21 (2) With regard to current employees, make a current employee's
22 personnel records available for inspection, and, if requested by the
23 employee or his or her representative, provide a copy thereof, at
24 the place where the employee reports to work, or at another location
25 agreeable to the employer and the requester. If the employee is
26 required to inspect or receive a copy at a location other than the
27 place where he or she reports to work, no loss of compensation to
28 the employee is permitted.

29 (3) (A) With regard to former employees, make a former
30 employee's personnel records available for inspection, and, if
31 requested by the employee or his or her representative, provide a
32 copy thereof, at the location where the employer stores the records,
33 unless the parties mutually agree in writing to a different location.
34 A former employee may receive a copy by mail if he or she
35 reimburses the employer for actual postal expenses.

36 (B) (i) Notwithstanding subparagraph (A), if a former employee
37 seeking to inspect his or her personnel records was terminated for
38 a violation of law, or an employment-related policy, involving
39 harassment or workplace violence, the employer may comply with
40 the request by doing one of the following:

1 (I) Making the personnel records available to the former
2 employee for inspection at a location other than the workplace that
3 is within a reasonable driving distance of the former employee's
4 residence.

5 (II) Providing a copy of the personnel records by mail.

6 (ii) Nothing in this subparagraph shall limit a former employee's
7 right to receive a copy of his or her personnel records.

8 (d) An employer is required to comply with only one request
9 per year by a former employee to inspect or receive a copy of his
10 or her personnel records.

11 (e) The employer may take reasonable steps to verify the identity
12 of a current or former employee or his or her authorized
13 representative. For purposes of this section, "representative" means
14 a person authorized in writing by the employee to inspect, or
15 receive a copy of, his or her personnel records.

16 (f) The employer may designate the person to whom a request
17 is made.

18 (g) Prior to making records specified in subdivision (a) available
19 for inspection or providing a copy of those records, the employer
20 may redact the name of any nonsupervisory employee contained
21 therein.

22 (h) The requirements of this section do not apply to:

23 (1) Records relating to the investigation of a possible criminal
24 offense.

25 (2) Letters of reference.

26 (3) Ratings, reports, or records that were:

27 (A) Obtained prior to the employee's employment.

28 (B) Prepared by identifiable examination committee members.

29 (C) Obtained in connection with a promotional examination.

30 (4) Employees who are subject to the Public Safety Officers
31 Procedural Bill of Rights (Chapter 9.7 (commencing with Section
32 3300) of Division 4 of Title 1 of the Government Code).

33 (5) Employees of agencies subject to the Information Practices
34 Act of 1977 (Title 1.8 (commencing with Section 1798) of Part 4
35 of Division 3 of the Civil Code).

36 (i) If a public agency has established an independent employee
37 relations board or commission, an employee shall first seek relief
38 regarding any matter or dispute relating to this section from that
39 board or commission before pursuing any available judicial
40 remedy.

(j) In enacting this section, it is the intent of the Legislature to establish minimum standards for the inspection and the receipt of a copy of personnel records by employees. Nothing in this section shall be construed to prevent the establishment of additional rules for the inspection and the receipt of a copy of personnel records that are established as the result of agreements between an employer and a recognized employee organization.

(k) If an employer fails to permit a current or former employee, or his or her representative, to inspect or copy personnel records within the times specified in this section, or times agreed to by mutual agreement as provided in this section, the current or former employee or the Labor Commissioner may recover a penalty of seven hundred fifty dollars (\$750) from the employer.

(l) A current or former employee may also bring an action for injunctive relief to obtain compliance with this section, and may recover costs and reasonable attorney's fees in such an action.

(m) Notwithstanding Section 1199, a violation of this section is an infraction. Impossibility of performance, not caused by or resulting from a violation of law, may be asserted as an affirmative defense by an employer in any action alleging a violation of this section.

(n) If an employee or former employee files a lawsuit that relates to a personnel matter against his or her employer or former employer, the right of the employee, former employee, or his or her representative to inspect or copy personnel records under this section ceases during the pendency of the lawsuit in the court with original jurisdiction.

(o) For purposes of this section, a lawsuit "relates to a personnel matter" if a current or former employee's personnel records are relevant to the lawsuit.

(p) An employer is not required to comply with more than 50 requests under this section to inspect and receive a copy of personnel records filed by a representative or representatives of employees in one calendar month.

(q) This section does not apply to an employee covered by a valid collective bargaining agreement if the agreement expressly provides for all of the following:

(1) The wages, hours of work, and working conditions of employees.

1 (2) A procedure for the inspection and copying of personnel
2 records.

3 (3) Premium wage rates for all overtime hours worked.

4 (4) A regular rate of pay of not less than 30 percent more than
5 the state minimum wage rate.

6 ~~SEC. 2.~~

7 *SEC. 3.* No reimbursement is required by this act pursuant to
8 Section 6 of Article XIII B of the California Constitution because
9 the only costs that may be incurred by a local agency or school
10 district will be incurred because this act creates a new crime or
11 infraction, eliminates a crime or infraction, or changes the penalty
12 for a crime or infraction, within the meaning of Section 17556 of
13 the Government Code, or changes the definition of a crime within
14 the meaning of Section 6 of Article XIII B of the California
15 Constitution.